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Supreme Court, U.S.
FILED

031064 JAN 20 2004

No._____

In the Supreme Court of the United States

Norma J. Nesbit,
Petitioner

v.

Gears Unlimited, Inc.
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTORARI

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QUESTIONS PRESENTED

1. Was there a Title VII jurisdictional question presented below?

2. Is Title VII's 15 employee threshold a jurisdictional requirement, or a substantive element of the claim itself – and is there a difference?

PARTIES TO THE PROCEEDINGS

The petitioner is Norma J. Nesbit.
The respondent is Gears Unlimited, Inc.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at No. 01-1195 United States Court of Appeals for the Third Circuit (argued March 22, 2002, filed October 21, 2003), and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The decision of the District Court (99-CV-00655 M.D. Pa. Dec 21, 2000) is not reported, but is reprinted at Pet. App 58a.

STATUTORY PROVISIONS INVOLVED

42 US code Sections 2000e(b), 2000e-2(a)(1):

Section 2000e. Definitions.

For the purposes of this subchapter--

(b) the term "employer" means any person engaged in industry affecting commerce, who has 15 or more employees... and any agent of such person...

Section 2000e-2. Unlawful employment practices.

(a) Employer practices-

It shall be an unlawful employment practice for an employer-

(1) to... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin....

STATEMENT OF THE CASE

Procedure:

Petitioner, Norma Nesbitt, filed her amended complaint on or about July 13, 1999, alleging unlawful discrimination under Title VII (42 U.S.C. Section 2000e et seq.). The key legal issue in the underlying matter was whether the Respondent, Gears Unlimited Inc., was an employer for purposes of Title VII, i.e. whether Gears met the Title VII 15 employee threshold requirement. All parties viewed this material disagreement as a purely factual question. The District Court diligently researched this question, and also viewed the matter as a factual dispute, " the facts relevant to the jurisdictional issue, as gleaned from the deposition testimony, affidavits, and documents omitted by the parties in connection with defendants' motion to dismiss are as follows,". See page 4 of the trial court's memorandum and order, 44a. The trial court decided this factual dispute was for the court and not for a jury. The trial court referred to the parties disagreement as a "novel jurisdictional dispute". See page 3 of the trial court's Memorandum and Order, 43a. The District Court openly acknowledged on page 9, 50a of its memorandum, dismissing petitioners

claim below that the "... the Third Circuit has never approved the use of the traditional single employer test in the Title VII context...". The Third Circuit panel also worked diligently, taking over 18 months to compose its extremely thorough, well annotated, and thoughtful analysis. The panel's opinion is indeed a tribute to the industry of our appellate courts, but demonstrates, in the main, how complicated, and diversely seen, this question truly is. On October 21, 2003 the appellate court upheld the District Court's dismissal of Norma Nesbitt's claim, citing however, divers different reasons for doing so. This appeal followed.

Facts:

Winter's Performance Products is a corporation also owned by Vaughn Winter and his wife Madeline. Vaughn Winter is the President of Winter's Performance Products and his wife fulfills the role of secretary/treasurer. (Deposition of Vaughn Winter).

Vaughn Winter is on the Board of Directors of both Winter's Performance Products and Gears Unlimited.

Between December of 1994 and August of 1997, at any given moment Winter's Performance Products had approximately 40 employees. In both 1996 and 1997 separately, Winter's Performance Products had 15 or more employees for each working day in each of 20 or more calendar weeks during the year. (Deposition of Vaughn Winter).

Gears Unlimited and Winter's Performance

Products are two of a trio of corporations owned to some degree by Vaughn Winter. The third corporation is Maverick Industries, Inc. owned by Vaughn Winter and his wife. Vaughn Winter is the President of Maverick Industries, Inc. as well. (Deposition of Vaughn Winter).

Gears Unlimited, and Winter's Performance Products, and Maverick Industries, Inc. are the currently existing offspring of a Series of corporate enterprises formed by Vaughn Winter beginning in 1955 with the creation of a company called Winter's Transmission, owned by Winter and his wife. Winter's Transmission rebuilt transmissions. In 1973, Vaughn Winter shifted the emphasis of his business efforts to manufacturing automotive parts and he created Winter's Performance Products toward that end. In 1985 he dissolved Winter's Transmission. In 1990 he created Respondent Gears Unlimited, which then purchased an existing company by the name of Richland and assumed Richland's business of manufacturing transmission parts. (Deposition of Vaughn Winter).

All of Mr. Winter's enterprises involved, or still involve, the rebuilding or production of automotive parts. Winter's Performance Products manufactures transmission parts. Winters Performance Products manufactures vehicle "rear ends". Maverick Industries, Inc. at least in part, then warehouses parts produced by Winter's Performance Products. (Deposition of Vaughn Winter)

Ultimately, all management authority over Gears

Unlimited, as well as over Winters Performance Products lies totally in Vaughn Winter, and Vaughn Winter alone. He is the boss as to all of his businesses, and as to his wife and children when they are at work..

With respect to hiring at Gears Unlimited, Vaughn Winter permits his son and daughter to do some hiring, but ultimate authority lies in Vaughn Winter. For instance, if the son or daughter informed Vaughn about a potential hire, and if Vaughn Winter expressed reservations about the person's qualifications, then the person would not be hired. (Deposition of Vaughn Winter).

Hiring for both Gears Unlimited and Winter's Performance Products begins with Winter's Performance Products in that the public at large learns that Gears Unlimited or Winter's Performance Products is hiring by means of a sign outside. Gears Unlimited is down a back street a couple of blocks away (Deposition of Vaughn Winter). If Gears Unlimited needs employees, then someone from Gears Unlimited will "call down to the office and he'll say, hey we can use (a certain type of employee)." Someone from Winter's Performance Products then will send a potential employee "up there" to Gears Unlimited, after they are interviewed by either Vaughn Winter, his wife, or his son or daughter. (Deposition of Vaughn Winter).

Vaughn Winter interviews potential applicants if they might have machine shop qualifications, but only if the applicant is male. This is because Vaughn Winter is "uncomfortable" interviewing females,

because he feels they would not be truthful with him as a male, based on "past experience". He explains this by indicating that if a woman interviewed him it would make him nervous, and that he feels girls would rather work with other girls and men would rather work with men, and that he has had "embarrassing situations" come up when male warehouse employees have had interaction with woman employees in the past. (Deposition of Vaughn Winter).

With respect to firing at Gears Unlimited, Vaughn Winter permits his son and daughter to hire. However, he reserves for himself the right and sole authority to fire those individuals hired by his son and daughter. For instance, if in theory he were to become aware that an employee was on drugs or stealing, then Vaughn Winter would fire the employees, or have his son fire the employee. This would be true for both Gears Unlimited and Winter's Performance Products. (Deposition of Vaughn Winter). If an employee were to break equipment, then Vaughn Winter would decide whether or not to fire the employee, after taking into account the expense of the equipment, the degree to which breaking the equipment had been intentional, and this would apply both to Gears Unlimited and to Winter's Performance Products. (Deposition of Vaughn Winter).

'With respect to general management of Clears Unlimited, Vaughn Winter named a manager to place at the establishment: Randy Lau. However, Vaughn Winter retains power or authority to control Mr. Lau and his operations. Mr. Lau has discretion, as do

Vaughn Winter's children in his regard, but only when and where Vaughn Winter permits it. (Deposition of Vaughn Winter).

Winter's Performance Products and Gears Unlimited share an interrelationship with respect to production. If *the* machines at Winter's Performance Products are busy, and Gears Unlimited has a machine that is available, then Winter's Performance Products sends the part to Gears Unlimited to have them make *it,* and then sends it back down to Winter's Performance Products. This would hold true for production of parts for sale, or for integration into other products. (Deposition of Vaughn Winter). Parts travel back and forth between Gears Unlimited and Winters Performance Products on a daily basis, several times a day, as part of a several-stage production operation.

Vaughn Winter recalls that he did not interview appellant during her job application process. (Deposition of Vaughn Winter).

Plaintiff recalls being interviewed by Vaughn Winter, contrary to Vaughn Winters recollection. (Deposition of Norma Nesbit). Plaintiff recalls other facts about the interview, such as Vaughn Winter indicating that he had problems with women in the past, and had some concerns about hiring women. (Deposition of Norma Nesbit).

Plaintiff recalls other experienced workers indicating to her that Vaughn Winter made the final decisions relating to Personnel at Gears Unlimited, including hiring plaintiff (Deposition of Norma Nesbit). Gears Unlimited foreman, Randy Lau, on

several occasions has called Vaughn Winter to resolve problems that plaintiff has raised with Mr. Lau, even for matters as specific and micro managerial as apparently improper noises coming from the machinery. (Deposition or Norma Nesbit). Vaughn Winter would visit Gears Unlimited on a regular daily basis as part of his rounds. (Deposition of Norma Nesbit).

Vaughn Winter would conduct public relations tours within Gears Unlimited (Deposition of Norma Nesbit).

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals are deeply divided over the jurisdictional questions relating to Title VII's 15 employee threshold requirement.

II. The far-reaching implications of the third circuit opinion necessitates clarification from this court.

III. This court's own decisions are unclear, resulting in continuing confusion and anomalistic decisions in federal courts throughout the nation.

IV. This is a recurrent and important issue in federal employment discrimination law, on which this court should establish a uniform and predictable federal standard.

I. The Courts of Appeals are deeply divided over the jurisdictional questions relating to Title VII,s 15 employee threshold requirement.

The opinion under appeal is, primarily, an extremely well annotated documentation of the conflicts among the Circuits, our federal district courts, the NLRB, and even, according to the Third Circuit opinion, a lack of clarity in this court, as to what the law of Title VII is regarding cases brought against employers with a small, or minimal number, of employees. The Third Circuit points out, in relevant citations, a myriad of holdings from no less than four groups of Circuit Courts of Appeals and then goes on to create its own new interpretation as a point of departure from the current position of the Seventh Circuit. While doing so, the Third Circuit also speculates on how the First and Fourth circuits would approach federal question jurisdiction in such matters. During this entire discussion it is not entirely clear where , and how, the conflict between these circuit court holdings on the 15 employee minimum, leaves a potential plaintiff who might be involved in a possible multi-circuit case, or even an almost endless number of conflicts for those using this Third Circuit precedential opinion in an *EEOC v. Arabian American Oil company,* 499 US 244 (1991) type of case. The only thing that can be said of the incredibly complex matrix of different holdings and analysis presented by our appeals and district courts on this question is that a plaintiff embarks on a

bewildering journey of chance, laced with danger, that will not resolve the Third Circuit's basic concern, which is the administration of justice. Finally, the Third Circuit, in apparent frustration over any discernible consensus of judicial opinion in our nation, reasons to the conclusion that "while the matter is not free from doubt, the 15 employee threshold is a substantive element (whether an "employer" exists) of a Title VII claim and is not jurisdictional". See 24a. However, in doing so, the Third Circuit modifies a current position held by the Seventh Circuit, thus giving birth to a brand-new interpretation of this unsettled and confusing state of affairs.

Nowhere in their opinion is it clear how, or why, the Third Circuit turns to a "bankruptcy context" for an answer. For a plaintiff, or for a bureaucrat, or even a law school professor, let alone the average lawyer, discerning exactly what is meant by all of the intellectual legal analysis is not easy. It is immeasurably more difficult when the law is not only complex, but is lacking a common interpretation. Somewhere, somehow, the efficient administration of justice must presume some reasonable common denominator for the level of ability that those who must deal with the law in every day terms can achieve. To do so, with a minimum of confusion, and a maximum of certainty, is undoubtedly a goal to be desired. Otherwise, no one knows if, or when, they're doing wrong, or being injured.

II. The far-reaching implications of the Third Circuit opinion necessitates clarification from this court.

During its analysis of the state of the law, not only as to the standard of review to be applied to Title VII minimum threshold cases, the third circuit implicated a number of related jurisdictional concerns. Although often disclaiming their application to this case, the meaning is clear – the underlying case law is uncertain and confused. Among these were matters relating to the meaning and application of the Commerce Clause, congressional intent as to the minimum standard itself in Title VII and other statutory cases, and the impact of that standard in a jurisdictional context comparing domestic and international cases. For these reasons alone this court should provide guidance on how our federal courts should approach the threshold minimums in related situations i.e. there is a need for a general principle or rule of law.

III. This court's own decisions are unclear, resulting in continuing confusion and anomalistic state decisions in federal courts throughout the nation.

The Third Circuit panel that decided the case below clearly wrestled with the lack of guidance from this Court, or impliedly indicated that this Court's application of similar standards of review, failed to provide sufficient indications of how this court would rule on the Title VII question presented here. Consequently, being on its own, the Third Circuit

created what it believes was a more just and reasonable test to be applied in minimum threshold cases. In doing so, for lack of a decision from this court upon which to rely, the Third Circuit created a new test. This court is respectfully requested to address these issues to the benefit of pending and future litigants in all the Circuits and for employers overseas. An additional advantage of this Court's addressing this matter would be the unquestionable assistance provided to the Congress and to those involved with enforcement in the Executive branch.

IV. This is a recurrent and important issue in federal employment discrimination law on which this court should establish a uniform and predictable federal standard.

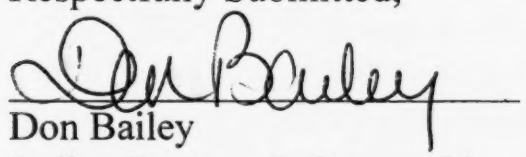
The entire memorandum opinion repeatedly addresses the confusing and complex holdings of our circuit courts, our federal district courts the NLRB, and other rule and law making entities, including the United States Congress, that must deal with interpreting the Title VII threshold minimum. Under our system of government, and consistent with this Court's original jurisdiction as reflected in Rule 10 (a)(b) and (c) the only institution which can resolve these inefficient and unjust conflicts, is this Court. The best example from petitioners prospective is the manner in which the Third Circuit viewed the facts in her case. Tragically, what plaintiff believes should be a central factual consideration in a minimum employee

threshold case, mainly, who is controlling the workplace, who is actually in control, who is the boss, who must everyone look to for a final decision, ie. who has the authority to hire and fire, was only minimally considered below as the factual genisis of her injury. Instead, a number of arbitrary and capricious characterizations of the financial, legal and market environment in which Gears operated dictated whether plaintiff would have a day in court and the fact was Vaughn Winter controlled, owned, and ran the show. She knew nothing of that. She was involved in that. All she knew was that Mr. Winter Sr. was the boss. The terms and conditions of plaintiffs work environment, was controlled and decided by him. The children and the wife's interest in Gears etc was held by them in trust. Norma believes a jury is better situated to decide the ultimate disagreement over these material facts. She questions the threshold whether the threshold question should be left as a law question for the court. Consequently petitioner believes that the confusing state of the law has denied her the opportunity to fairly present her case in a court of law. By disposing of her case on the "merits" the courts below did not address the justice of her case.

CONCLUSION

WHEREFORE for the foregoing reasons, this court is respectfully requested to grant certiorari.

Respectfully Submitted,



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APPENDIX EXHIBIT "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-1195

NORMA J. NESBIT

Appellant

Vs.

GEARS UNLIMITED INC.

Appellee

PRECEDENTIAL

Filed October 21, 2003

UNITED STATES COURT OF
APPEALS FOR THE THIRD
CIRCUIT

No. 01-1195

NORMA J. NESBIT,

v.

GEARS UNLIMITED, INC.

Appeal from the United States District
Court for the Middle District of
Pennsylvania
(D.C. Civil Action No. 99-cv-
00655)District Judge: Honorable
Yvette Kane

Argued March 22, 2002

Before: NYGAARD, ROTH and AMBRO, *Circuit Judges*

(Opinion filed: October 21, 2003)

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OPINION OF THE COURT

AMBRO, *Circuit Judge*:

Title VII of the Civil Rights Act of 1964 prohibits companies employing "fifteen or more" persons from discriminating on the basis of sex in hiring, discharge, compensation, or terms of employment. 42 U.S.C. §§ 2000e(b), 2000e-2(a)(1). Norma Nesbit alleges that Gears Unlimited, Inc. ("Gears") terminated her employment as a machine operator because of her sex. She concedes that Gears did not employ fifteen persons during the pertinent time period, but argues that we should also count the employees at a related entity, Winters Performance Products ("Winters"). Together, Gears and Winters had more than fifteen employees. We hold that the District Court properly refused to aggregate the number of employees at these companies. Because Title VII does not cover Gears by itself, we affirm the dismissal of Nesbit's complaint. But we part with the District Court on the path to this result. It viewed Title VII's "fifteen or more" person requirement as jurisdictional. We affirm the dismissal

of Nesbit's complaint on the merits rather than for lack of subject matter jurisdiction.

I. FACTS AND PROCEDURAL HISTORY

In 1973, Vaughn Winter, Sr. ("Vaughn Sr.") founded Winters, which manufactures "rear ends" for high-performance automobiles. In 1990, he acquired Gears, a transmission parts manufacturer. Vaughn Sr. and his wife, Madeline Winter ("Madeline"), also formed Maverick Industries, Inc. ("Maverick"), which warehouses automotive parts, including parts produced at Winters. At the time of the events relating to this suit — December 1994 through August 1997 — Vaughn Sr. had a stake in three automotive companies: Gears, Winters, and Maverick.

The Winter family shares ownership and control of these three companies. Vaughn Sr. owns ten percent of Gears, with the remainder held in trust in equal shares for his children — Nina and Vaughn Jr. Vaughn Sr. is president of Gears and his children are corporate officers. He and Madeline own Winters and Maverick in equal shares. He is president of Winters and Maverick, and Madeline is the Secretary/Treasurer at Winters.

Gears and Winters occupy separate plants about one mile apart in York, Pennsylvania. In almost all respects, they operate independently. Their products are distinct — Gears produces transmissions and Winters produces automotive rear ends — and each company has its own equipment and production lines.

Winters contracts to buy parts from Gears at market rates. The companies maintain separate financial records and payrolls, write separate checks, and file separate tax returns.

Vaughn Sr. monitors operations at both Gears and Winters. While he participates in day-to-day management at Winters, Gears is managed by Randy Lau. Vaughn Sr. testified that he visits the Gears facility only about twice a month, usually because a machine has broken down. Nesbit disputes this testimony, contending that Vaughn Sr. spends time at Gears "pretty much every day."

The only area in which Gears and Winters cooperate considerably is in hiring. Typically, if either Gears or Winters has an opening, a Winters employee will place a "help wanted" sign on the street in front of the Winters building. Prospective employees obtain applications at the Winters front office and return them there as well. If Winters is hiring, either Vaughn Sr. or his wife will invite qualified applicants for an interview. If Gears has an opening, someone at Winters will communicate with the applicant on Lau's behalf and then direct him or her to the Gears plant to interview with Lau. The hiring decision is then Lau's "prerogative." However, Vaughn Sr. (who, as noted above, normally does not participate in Gears management) can request that Gears hire a particular applicant and Gears will generally do so. Either Lau or the Winter children normally decide whether to terminate an employee, but Vaughn Sr. testified that he

could ask Gears to fire an employee who engaged in significant misconduct.

On December 14, 1994, Nesbit submitted a standard employment application to Winters for a machine operator position. That day, either Vaughn Sr. or Madeline interviewed her.[1] The interviewer concluded that no available positions at Winters would be suitable for Nesbit and instead referred her to Gears, which hired her as a machine operator.[2] Vaughn Sr. personally accompanied Nesbit to meet Lau, but the parties dispute whether Vaughn Sr. or Lau actually made the hiring decision.

Nesbit remained at Gears for two years and eight months. She perceived that Lau was her "boss" and was "more or less in charge" at Gears. Occasionally she also worked an extra shift at Winters following her regular shift at Gears. She would punch out on the time clock at Gears and then punch in at Winters. When working a Winters shift, she received a separate paycheck. Her hours at the two plants were not consolidated for overtime pay.

On August 19, 1997, Nesbit's machine at Gears "crashed," leaving it unusable without repairs. Nesbit became upset, which apparently caused her to develop a headache and neck pains. She informed the acting supervisor, Greg Pell, that she was leaving work to visit her chiropractor. When she returned the next day, Lau was on vacation, and Vaughn Sr. discharged her for insubordination.

After receiving permission from the Equal Employment Opportunity Commission, Nesbit filed suit in the United States District Court for the Middle District of Pennsylvania alleging that Gears discriminated against her because of gender. Gears moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction on the basis that it employed fewer than fifteen persons during the relevant time period and therefore was not an "employer" subject to Title VII.

Nesbit then filed an amended complaint alleging that

1. 1. The parties dispute whether Vaughn Sr. or Madeline conducted the initial interview, though it is not important for our analysis.
2. 2. Nesbit is plaintiff's maiden name and the name she uses in this litigation. The name on her employment application and in Gears' employment records is Norma J. Tran.

Gears and its "associate corporation" Winters Transmission, Inc. — a company different from Winters that Vaughn Sr. owned from 1955 to 1985 — were really a single employer with more than fifteen employees. Gears moved again for a dismissal, this time observing that the entity called "Winters Transmission, Inc." had ceased operation long before Nesbit began working at Gears. Nesbit then filed a second amended complaint, alleging that Gears and Winters are associate corporations that together meet the fifteen-employee threshold. On the basis of that

allegation, the District Court ordered discovery limited to the question whether Gears and Winters constitute a single employer under Title VII. Following discovery, the District Court issued a memorandum and order in which it concluded that Gears and Winters are separate entities and, because Gears unquestionably employs fewer than fifteen persons by itself, dismissed Nesbit's complaint for lack of subject matter jurisdiction. This appeal followed.

II. DISCUSSION

A. Is the Number of Employees a Jurisdictional Requirement?

We first address whether Title VII's fifteen-employee threshold is a jurisdictional prerequisite — as the District Court believed it was in dismissing Nesbit's complaint pursuant to Rule 12(b)(1) — or whether it is a substantive element of a Title VII claim. Whether an aspect of a claim concerns subject matter jurisdiction or the merits has at least three implications. First, because subject matter jurisdiction is non-waivable, courts have an independent obligation to satisfy themselves of jurisdiction if it is in doubt. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977). A necessary corollary is that the court can raise *sua sponte* subject-matter jurisdiction concerns. Second, if the fifteen-employee requirement is not jurisdictional, a Title VII claim for which the number of employees is in doubt nonetheless will support supplemental jurisdiction

under 28 U.S.C. § 1367 over state claims. *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 362 & 365 (2d Cir. 2000); 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3564, at 73-5 (2d ed. 1984). Third, in most contexts the question will be important to the plaintiff 's burden of proof. If an aspect of a claim concerns jurisdiction, and when jurisdiction turns on whether a particular fact is true as here (as opposed to whether the complaint sufficiently alleges jurisdiction on its face), a court may inquire into the jurisdictional facts without viewing the evidence in a light favorable to either party. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). By contrast, if an aspect of a claim concerns the merits, on a Rule 12(b)(6) motion to dismiss for failure to state a claim a court must accept the complaint's allegations as true, *United States Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002); on a Rule 56 motion for summary judgment it must view the evidence in the light most favorable to the non-moving party and, if there are disputes over genuine issues of material fact, they are for the jury to resolve, *Huang v. BP Amoco Corp.*, 271 F.3d 560, 564 (3d Cir. 2001).

1. Relevant Caselaw

The question whether Title VII's fifteen-employee threshold is a jurisdictional prerequisite when a plaintiff brings a colorable Title VII claim has divided the courts of appeals.[3] The Second and Seventh Circuits conclude that it is a substantive element that the plaintiff must prove unless the claim that there are

fifteen employees is so obviously unfounded that it fails to raise a genuine federal controversy. *Da Silva*, 229 F.3d at 364-65 (2d Cir.);

3. In *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997), the Supreme Court granted *certiorari* to decide whether the Seventh Circuit erred in dismissing a Title VII suit for lack of subject matter jurisdiction because the defendant company lacked fifteen employees during the relevant period. The Court reversed and remanded, concluding that the Seventh Circuit had erred in determining the number of employees, but did not address whether the fifteen-employee requirement is jurisdictional or an element of the merits. *Id.* at 212.

Moreover, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the Supreme Court found it "unnecessary to consider the District Court's invocation of Rule 12(b)(1) [lack of subject matter jurisdiction], as opposed to Rule 12(b)(6) [failure to state a claim]" on a similar issue — whether "Title VII [is applicable] to the selection of partners by a partnership." *Id.* at 72-73 & n.2. *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1001-02 (7th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3021 (U.S. Sept. 2, 2003) (No. 03-354); *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 943 (7th Cir. 1999); *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677-678 (7th Cir. 1998). Moreover, the D.C. Circuit has held the Americans with Disabilities Act's("ADA") fifteen-employee threshold an element of the merits. *EEOC v. St. Francis Xavier Parochial*

Sch., 117 F.3d 621, 623-25 (D.C. Cir. 1997). In this context, the ADA's fifteen-employee requirement is in all relevant respects indistinguishable from Title VII's.

By contrast, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have said that the fifteen-employee threshold is jurisdictional. *Greenless v. Eidenmuller Enters., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994); *Armbuster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983); *Childs v. Local 18, IBEW*, 719 F.2d 1379, 1382 (9th Cir. 1983); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980);[4] *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999). Moreover, in *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983), the First Circuit upheld a district court's dismissal of a Title VII case for lack of subject matter jurisdiction (although the basis for the District Court's dismissal in *Thurber* — lack of jurisdiction or the merits — was uncontested; at issue was the number of employees the employer had). The Fourth Circuit also held that the number of employees is jurisdictional in a case brought under the Family and Medical Leave Act ("FMLA"), a holding that suggests it would deem the number of employees jurisdictional in the Title VII context as well. *See Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) ("A district court lacks subject matter jurisdiction over an FMLA claim if the defendant is not an employer as that term is defined in the FMLA [which defines an employer as "any person . . . who employs 50 or more employees.]").

The division is deeper than merely inter-circuit.

Even

4. Likewise, in *Trainor v. Apollo Metal Specialties*, 318 F.3d 976, 978 n.2 (10th Cir. 2003), the Tenth Circuit held that whether an employer employs fifteen people is a jurisdictional question in a case brought under the ADA. within certain circuits that have held Title VII's fifteen-employee threshold jurisdictional, there is conflict. While in *Owens* the Tenth Circuit assumed (without analysis) that the requirement is jurisdictional, in *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987), that Court held that the fifteen-employee threshold is both jurisdictional and "intertwined with the merits of the case," and therefore should have been resolved as if on the merits. *Id.* at 259.

The Eleventh Circuit is similarly conflicted. In *Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997), the Court opined that the Age Discrimination in Employment Act's twenty-employee threshold "goes to the merits of an ADEA case." *Id.* at 1258. It reasoned that "the section of the ADEA that provides the substantive relief " — the section forbidding an employer from discriminating — "is intertwined and dependent on the section of the ADEA that defines the scope of the act" — the section defining "employer" as one who employs more than twenty employees. *Id.* at 1263. However, in a later case, *Scarfo*, 175 F.3d 957, the Eleventh Circuit dismissed a plaintiff 's Title VII claim for lack of subject matter jurisdiction when the

defendant fell short of fifteen employees. A third case, *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003), recognized this intra-circuit conflict and essentially joined both camps. It stated that, in the FMLA context, a fifty-employee threshold "implicate[s] *both* jurisdiction and the underlying merits." *Id.* at 929 (emphasis added). However, it held that *Garcia* correctly disposed of the issue as a matter of procedure: "the district court was required to find that jurisdiction exists and deal with the objection as a direct attack on the merits of plaintiff 's case" because of the degree to which the jurisdictional and merits inquiries were intertwined. *Id.* at 929-30 (internal quotation marks omitted).[5]

5. Moreover, all the circuits that have held the fifteen-employee threshold jurisdictional have also stated — in the same case or in other cases — that "where the jurisdictional facts are intertwined with the facts central to the merits of the dispute[,] [i]t is the better view that . . . the entire factual dispute is appropriately resolved only by a proceeding on the merits." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see Clark v. Tarrant County, Texas*, 798 F.2d 736, 741-42 (5th Cir. 1986); *Gould,*

2. Title VII's Fifteen-Employee Requirement is an Element of the Merits

With this conflict in mind, we begin our determination by noting that subject matter jurisdiction is the "courts' statutory or constitutional *power* to

adjudicate" particular cases. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis in original). *Steel Co.* requires that courts normally should not conflate subject matter jurisdiction with elements of an action's merits. The Supreme Court held that the elements of another federal statute — the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(a)(1) — are not jurisdictional prerequisites. *Steel Co.*, 523 U.S. at 90-93. In relevant part, EPCRA requires users of specified hazardous chemicals to file annual reports detailing their chemical inventories, waste-disposal methods, and recent releases of chemicals from their facilities into the environment, and provides that the "district courts shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." 42 U.S.C. §11046(c). The *Steel Co.* plaintiff, a group to protect environmental rights, sued a Chicago manufacturer and asserted past violations of EPCRA. After being notified that it was in arrears on its filings, the manufacturer filed all the overdue reports. The plaintiff nonetheless continued its suit, seeking relief for past reporting violations.

The District Court concluded that EPCRA does not support suits for past violations and therefore dismissed the plaintiff 's complaint under both Rules 12(b)(1) and 12(b)(6). The Court of Appeals for the

Fourth Circuit reversed, holding that EPCRA permits such suits. The Supreme Court determined that the case raised (1) whether *Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988); *Timberlane v. Bank of Am.*, 749 F.2d 1378, 1381 (9th Cir. 1984), *overruled on other grounds by Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Wheeler v. Hurdman*, 825 F.2d at 259; *Morrison v. Amway Corp.*, 323 F.3d at 929. These cases highlight the unsettled nature of the merits/jurisdictional question. The plaintiff had constitutional standing and (2) whether allegations of past violations state a cause of action under EPCRA, *Steel Co.*, 523 U.S. at 88. As to the latter, the Court decided that the past violations question was on the merits and not a jurisdictional requirement. *Id.* at 110. In so doing, *Steel Co.* rejected attempts to portray the requirement to prove all elements of a cause of action as relevant to federal courts' jurisdiction to hear a suit. The Court reasoned that "[i]t is firmly established in our cases that absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction." *Id.* at

89. On the contrary,

> '[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.' Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and

> laws of the United States are given one construction and will be defeated if they are given another . . . .'

Id. at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)).

The Court also criticized the implications of treating the validity of a cause of action as jurisdictional. *Id.* at 92-93. Under that approach, each element of every cause of action would have a legitimate claim to being a jurisdictional requirement — essentially eviscerating the distinction between the jurisdictional and merits inquiry (and requiring a court to dismiss a claim for lack of jurisdiction whenever the plaintiff does not prevail). The Court made plain, however, that subject matter jurisdiction *is* lacking if the alleged basis for jurisdiction "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial or frivolous." *Id.* at 89.

We presaged *Steel Co.* in a case decided five years earlier. In *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1280-81 (3d Cir. 1993), the District Court dismissed a claim under the Fair Housing Act for lack of subject matter jurisdiction. The Fair Housing Act makes it unlawful, *inter alia,* "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). The District Court concluded that the defendant did not "make unavailable or deny" housing to the plaintiff

and that the Fair Housing Act was therefore not implicated. We reversed, holding that "[a] district court has federal question jurisdiction in any case where a plaintiff with standing makes a non-frivolous allegation that he or she is entitled to relief because the defendant's conduct violated a federal statute." *Growth Horizons*, 983 F.2d at 1281. We further explained that "[d]ismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.' " *Id.* at 128081 (citing *Kulick v. Pocono Downs Racing Ass'n*, 816 F.2d 895, 899 (3d Cir. 1987) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974))); *see also* 2 Moore's Federal Practice § 12.30[1], at 12-36 (3d ed. 2000) ("Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff 's need and ability to prove the defendant bound by the federal law asserted as a predicate for relief — a merits-related determination.").[6]

6. The Restatement (Second) of Judgments: Subject Matter Jurisdiction § 11 (1982) also addresses the question whether an issue affects subject matter jurisdiction or the merits, ultimately concluding that there is no principled way to distinguish between the two. It notes that "[t]here is a strong tendency in procedural law to treat various kinds of serious

procedural errors as defects in subject matter jurisdiction . . . because characterizing a court's departure in exercising authority as 'jurisdictional' permits an objection to the departure to be taken belatedly." Restatement (Second) of Judgments: Subject Matter Jurisdiction § 11 cmt. e. Relevant to the question here, it goes on to note that

> [t]he difficult problems are encountered when the issues on which the court's subject matter jurisdiction depends are not so clearcut. [For example,] if the court has jurisdiction of actions of more than a specified amount, there can be uncertainty in whether a particular claim exceeds that amount. The problem can be particularly difficult

Turning to Title VII, we note that those courts that have held the fifteen-employee requirement jurisdictional have provided no reasons for their holding; rather, they have assumed it so or stated the conclusion without meaningful analysis. Moreover, in reading 42 U.S.C. § 2000e(b) we perceive no congressional intent to make the requirement jurisdictional. Indeed, Title VII contains an explicit jurisdictional section, § 2000e-5(f)(3), which provides that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." By contrast, § 2000e(b) — in which the fifteen-employee requirement appears — is a definitional section, defining "employer." We doubt that Congress intended this definitional section to have subject matter jurisdictional import. If

Congress had so intended, we believe its intention would be clearer. Notably, § 2000e(b) does not even contain the word "jurisdiction." *Compare* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *id.* § 1332 (explicitly making diverse citizenship and a $75,000 amount-in-controversy jurisdictional prerequisites). Moreover, congressional debate (albeit postdating the requirement that an "employer" have more than fifteen employees) reveals that at least some legislators regard the fifteen-employee minimum not as jurisdictional but as an element of the cause of action. *See* 137 Cong. Rec. H9505-01 (Daily ed. Nov. 7, 1991) (statement of Rep. Brooks) ("[W]hen a company has less than 15 employees, there are no damages available whatsoever because there is no cause of action under our current antidiscrimination statutes.").

when the issue determining subject matter jurisdiction parallels an issue going to the merits.

Id. In those cases the Restatement concludes that "the matter in question can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits or procedure." *Id.*

3. *Most Plausible Arguments for Making Fifteen-Employee Requirement Jurisdictional*

a. *Commerce Clause Argument*

Perhaps the most plausible reason for finding that the fifteen-employee requirement is jurisdictional is that it concerns a "dispute[ ] as to the existence of a fact that is essential to a constitutional exercise of Congress's power to regulate." *Da Silva*, 229 F.3d at 363 (suggesting this as a situation "[l]ess clearly placed on one side of the jurisdiction/merits line"). As discussed, Title VII applies to "employers" and defines an "employer" (in relevant part) as "a person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). Because Congress enacted Title VII under its Commerce Clause power, *EEOC v. Ratliff*, 906 F.2d 1314, 1315-16 (9th Cir. 1990), the requirement that an employer be "in an industry affecting commerce" is the statute's constitutional basis. And because the requirements that the employer be "in an industry affecting commerce" and that the employer have "fifteen or more employees" appear side by side in the statute, it is arguably reasonable to read § 2000e(b)'s "fifteen employee" minimum as relevant to Title VII's Commerce Clause basis as well. That is, one might read the fifteen-employee threshold as reflecting Congress's determination that only those companies with fifteen or more employees have the requisite substantial effect on interstate commerce to permit Congress to enact the statute. *See Legislative History*

of Titles VII and XI of Civil Rights Act of 1964, at 2108 (1964) ("The bill proceeds upon a theory . . . that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured.") (separate minority views of Reps. Poff and Cramer, Members, House Comm. on the Judiciary); *cf. Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991) (noting "Congress's determination in Title VII that any employer with 15 or more employees necessarily implicates interstate commerce"); *Ratliff*, 906 F.2d at 1317 ("[I]t is difficult to imagine any activity, business or industry employing 15 or more employees that would not in some degree affect commerce among the states.") (quoting A. Larson & L.K. Larson, *Employment Discrimination* § 5.31, at 2-40 (1987)).

This argument, while well-made, nonetheless is unconvincing. First, the very wording of 42 U.S.C. § 2000e(b) suggests that the requirements that an employer be "in an industry affecting commerce" and have "fifteen or more employees" are separate and independent, and that it is a mistake to conflate the two. Even if a putative employer has twenty employees, it is not covered by Title VII if not in an industry affecting commerce. Second, while the preceding Commerce Clause-based justification for Title VII's fifteen-employee requirement makes intuitive sense, it finds little support in the legislative history. We note that the 1972 amendments to Title VII lowered the minimum number of employees from

twenty-five to fifteen. Patricia Davidson, Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. Cin. L. Rev. 203, 206 (1984) (noting this change). It lacks logic that, pre-1972, Congress believed that it took twenty-five employees for a substantial effect on interstate commerce but changed its mind in 1972. Furthermore, as initially proposed, the 1972 amendment to Title VII contained an eight-employee threshold. *See Armbruster*, 711 F.2d at 1337 n.4. The threshold was ultimately raised to fifteen employees as the result of a political compromise, *see id.*, in order (among other reasons) "to protect ethnic businesses and small businesses." Davidson, *supra*, at 206 & n.23. Thus, the fifteen-employee threshold appears motivated by policy — to spare small companies the expense of complying with Title VII — rather than Commerce Clause considerations.

Even assuming that Congress lacks authority to enact a statute does not mean that a federal court lacks jurisdiction to review actions brought under that statute. When disposing of a claim brought under an unconstitutional statute, courts ordinarily deny the claim on the merits, on the ground that the statute under which relief is sought is unconstitutional, rather than for lack of subject matter jurisdiction. *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987); *Kulick v. Pocono Downs Racing Ass'n, Inc.*, 816 F.2d 895 (3d Cir. 1987) (noting the difference

between congressional jurisdiction and federal courts' Article III jurisdiction, and concluding that "[e]lements of a claim that are called jurisdictional because they relate to Congress's jurisdiction remain questions of the merits"); *see also Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231 (E.D. Ky. 1992), *aff 'd*, 1 F.3d 1487 (6th Cir. 1993), *aff 'd*, 514 U.S. 211 (1995).

b. *Jurisdictional Statements in Other Supreme Court Cases*

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991), can be read to suggest that the fifteen-employee requirement is jurisdictional. In that case, the Supreme Court decided whether Title VII "applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad." *Id.* at 246. The Court addressed the question not as whether Title VII granted plaintiffs a cause of action for extraterritorial violations, but rather whether Title VII granted extraterritorial jurisdiction, *see id.* at 250, and affirmed the dismissal of the complaint for lack of jurisdiction. *Id.* at 259. In *Arabian American Oil Co.*, however, a policy consideration — namely, the significant effect extraterritorial application of U.S. law might have on international relations — favored viewing the extraterritoriality question as one of jurisdiction. That is, even if parties did not raise the question of Title VII's extraterritorial application, Congress would likely have intended courts to raise the issue *sua sponte* in the interest of harmonious international

relations. Such concerns of international comity are not present here.

By analogy, some may find *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), to counsel for finding jurisdictional the fifteen-employee requirement. In that case, the Supreme Court stated that "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer that 15 employees." *Id.* at 119 n.5. But this does not address the question before us. Title VII grants the EEOC power "to prevent any person from engaging in any unlawful employment practice." 42 U.S.C. § 2000e-5(a). Thus, if an entity (a "person" under the statute) employs fewer than fifteen employees, by § 2000e-5(a)'s terms, the *EEOC* lacks power (jurisdiction). By contrast, Title VII's jurisdictional grant to the *federal courts* is broader. *See id.* § 2000e-5(f)(3) ("Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.").

4. Judicial Administration Reasons for Fifteen-Employee Requirement Being an Element of a Title VII Claim rather than a Jurisdictional Requirement

As a policy matter — which is ultimately the gut of our inquiry — it also makes little sense to regard the fifteen-employee threshold as jurisdictional. Such a holding would require a federal court to determine whether a company had fifteen employees during the

relevant period, even if the parties so stipulated. To require a federal court to engage in such a fact-intensive inquiry *sua sponte* — which might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets — appears to be a waste of scarce judicial resources, and we doubt that Congress intended such a result. *See Da Silva*, 229 F.3d at 365 ("[I]nstitutional requirements of a judicial system weigh in favor of narrowing the number of facts or circumstances that determine subject matter jurisdiction."); *Sharpe*, 148 F.3d at 678 ("Surely the number of employees is not the sort of question a court (including appellate court) must raise on its own . . . .").

To hold the requirement jurisdictional also implies that a court would need to decide whether an entity employed more than fifteen individuals before reaching a Title VII action's merits — even if the merits were more easily resolved than the "jurisdictional" question. *Steel Co.*, 523
U.S. at 94-95. This result too is undesirable.

* * * * * * * * *

In this context, we hold that, while the matter is not free from doubt, the fifteen-employee threshold is a substantive element (whether an "employer" exists) of a Title VII claim and is not jurisdictional. Federal jurisdiction is implicated only when the Title VII claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial or frivolous," *Steel Co.*,

523 U.S. at 89, neither of which is the case here.

B. Should We Consolidate the Number of Employees at Gears and Winters?

As the District Court looked beyond Nesbit's complaint and reviewed discovery on whether Gears employs more than fifteen people, it should have resolved the issue under the summary judgment standard rather than as a motion for judgment on the pleadings. Fed. R. Civ. P. 12(c). Nonetheless, we may affirm its disposition for any reason supported by the record. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109 (3d Cir. 2002). Though the District Court analyzed this case as jurisdictional rather than on the merits, Nesbit fails nonetheless. Gears and Winters are plainly separate entities that cannot be consolidated to meet the fifteen-employee threshold.

1. The National Labor Relations Board's "Integrated Enterprise" Test

Several courts of appeals have borrowed a four-part test

— commonly called the "integrated enterprise" test or the "single employer" test — from the National Labor Relations Board ("NLRB") to determine when two nominally distinct companies should be treated as a single entity under Title VII. *See Anderson v. Pacific Maritime Association*, 336 F.3d 924, 929 (9th Cir. 2003); *RC Aluminum Industries, Inc. v. National Labor Relations Board*, 326 F.3d 235, 239 (D.C. Cir. 2003); *Parker v. Columbia Pictures Indus.*, 204 F.3d

326, 341 (2d Cir. 2000); *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1184 (8th Cir. 1998); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993); *McKenzie*, 834 F.2d at 933; *Childs*, 719 F.2d at 1382-83; *Armbruster*, 711 F.2d at 1336-38; *Trevino v. Celanese Corp.*, 701 F.2d 397, 403-04 (5th Cir. 1983). The four factors of the NLRB test are "(1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control." *Artis*, 161 F.3d at 1184 (citation omitted); *see also NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d. 1117, 1122 (3d Cir. 1982) (discussing the test in the labor context). Among these factors, "[n]o single factor is dispositive; rather, single employer status under this test 'ultimately depends on all the circumstances of the case.' " *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001) (describing but not adopting the test in a case applying the Worker Adjustment Retraining Notification Act) (citation omitted). "[T]he heart of the inquiry is whether there is an absence of an arm's-length relationship among the companies." *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1184 (10th Cir. 1999) (citations omitted); *Browning-Ferris*, 691 F.2d at 1122. Moreover, "[c]ourts applying this four-part standard in Title VII and related cases have focused on the second factor: centralized control of labor relations." *Trevino*, 701 F.2d at 404.

The Seventh Circuit has rejected the NLRB's four-factor test as unhelpful in the anti-discrimination context. *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 942-

43 (7th Cir. 1999). In addition, other courts have occasionally listed, but essentially ignored, the NLRB factors in Title VII cases, focusing instead on which entity actually made the allegedly discriminatory employment decision. *See, e.g.*, *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997); *see also* Marc Crandley, Note, *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 Ind. L.J. 1041, 1059-71 (2000) (arguing against application of the NLRB test in the Title VII context and presenting alternative options).

As the National Labor Relations Act ("NLRA") and Title VII address aspects of employer-employee relations, there is surface appeal to applying the NLRB's test in the Title VII context. But given the different policies animating the two statutes, the NLRB test does not self-steer to the Title VII context. That test is designed to determine whether the NLRB may decide a particular labor dispute. *UA Local 343 United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada, AFL-CIO v. Nor-Cal Plumbing, Inc.* 48 F.3d 1465, 1470 (9th Cir. 1994) ("[I]f the NLRB finds that [two firms] constitute a single unit . . . the collective bargaining agreement with the union firm [may] be extended to the non-union firm."); Crandley, *supra*, at 1064-65; *see also Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996) (describing the test's purpose to be "to

protect the collective bargaining rights of employees and to advance industrial stability"). If the company at issue satisfies the NLRB test, it will in many cases be required to submit to collective bargaining. Crandley, *supra*, at 1064. But if a defendant in a Title VII suit is deemed an "employer" within the meaning of the statute, it may be subject to liability.

Because the NLRA and Title VII ask whether entities are a single enterprise for different reasons, it does not follow that the NLRB's test is any more relevant to Title VII cases than any of the other tests for determining whether two companies should be regarded as one. To the contrary, for purposes of determining whether two companies are a single employer, the NLRA's policy goals point in a different direction than Title VII's. As discussed, a significant purpose of the fifteen-employee minimum in the Title VII context is to spare small companies the considerable expense of complying with the statute's many-nuanced requirements. *See Papa*, 166 F.3d at 940; *Armbruster*, 711 F.2d at 1337 n.4 (reviewing the legislative history behind the fifteen-employee minimum). This goal suggests that the fifteen-employee minimum should be strictly construed. By contrast, the NLRB's jurisdiction was intended to be expansive, suggesting a more lenient test for labor cases. *See* Crandley, *supra*, at 1065-66. Thus we deem there is little reason to refer to the NLRB's test in deciding whether two entities should together be considered an "employer" for Title VII purposes. We

instead adopt a different framework, tailored to Title VII's policy goals.

2. Our Framework

In *Papa*, the Seventh Circuit developed its own test to determine whether two nominally distinct entities should be considered as one for Title VII purposes. The Court began with the "basic principle of affiliate liability[,] . . . that an affiliate forfeits its limited liability only if it *acts* to forfeit it." *Id.* at 941 (emphasis in original). It proceeded to find three situations in the Title VII context when a company and its affiliates forfeit limited liability and thus are deemed a single employer: (1) where a company has split itself into entities with less than fifteen employees with the intent to evade Title VII's reach; (2) when a parent company has directed the subsidiary's discriminatory act of which the plaintiff is complaining; or (3) when a court would otherwise pierce the corporate veil (*i.e.*, look behind the corporate form to hold a corporation's shareholders personally liable). *Id.* at 940-41.

We too will consider a company and its affiliates a single employer under Title VII (1) when a company has split itself into entities with less than fifteen employees intending to evade Title VII's reach or (2) when a parent company has directed the subsidiary's discriminatory act of which the plaintiff is complaining. However, on the third part of this disjunctive test, we articulate a slightly different standard from the Seventh Circuit. Rather than

applying the test for veil piercing imported from the corporation law context (because individual shareholder liability is not implicated here), we will apply the factors courts use to determine when substantively to consolidate two or more entities in the bankruptcy context. When courts substantively consolidate two entities, they treat the assets and liabilities of each as belonging to a single entity. We explain in further detail each test.

a. *Splitting a Single Company into Two or More to Evade Title VII*

When a plaintiff proves that a company has split itself into multiple entities to evade coverage under Title VII, we consider those entities a single company for purposes of meeting the fifteen-employee threshold. "The privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties." *Id.* at 941.

A plaintiff need not prove that evading Title VII was the *only* reason that a business split itself into multiple entities. Rather, it must make a *prima facie* case that this was a substantial motivating factor, after which the burden will shift to the defendant to produce evidence rebutting the plaintiff 's proof. Relevant to a *prima facie* case are considerations such as (1) lack of a reasonable business justification, (2) whether the business split was one that, as an operational matter, would more sensibly be contained within a single business entity (*e.g.*, the two companies make the

same product or inputs for the same product), and (3) statements from those familiar with the industry suggesting that the company was split into multiple entities to evade Title VII.

b. *Parent Directing Subsidiary's Act*

When the companies sought to be aggregated for Title VII purposes are in a parent-subsidiary relationship, we shall deem a parent and subsidiary a single employer when the parent has directed the subsidiary to perform the allegedly discriminatory act in question. By directing such an act, the parent disregards the separate corporate existence of the subsidiary and thus forfeits the right to be treated as a separate entity for Title VII purposes. Moreover, in such a situation the parent itself has committed the act in question and thus should share responsibility with the subsidiary. *See Papa*, 166 F.3d at 941.

c. *Substantive Consolidation*

Absent either of the first two situations, we shall look to the factors courts use in deciding whether substantively to consolidate two or more entities in the bankruptcy context. While these factors vary from circuit to circuit, the test at base seeks to determine whether two or more entities' affairs are so interconnected that they collectively caused the alleged discriminatory employment practice. More colloquially, the question is whether the "eggs" — consisting of the ostensibly separate companies — are

so scrambled that we decline to unscramble them. We note, however, that substantive consolidation is an equitable remedy and is difficult to achieve.[7]

7. In addressing whether substantively to consolidate two entities in the bankruptcy context, courts have developed a number of different tests. Some have applied a seven-factor test, first set forth in *In re Vecco Construction Industries, Inc.*, 4 B.R. 407 (Bankr. E.D. Va. 1980). Those factors are: "(1) The presence or absence of consolidated financial statements; (2) The unity of interests and ownership between various corporate entities; (3) The existence of parent and intercorporate guarantees on loans; (4) The degree of difficulty in segregating and 22 We adopt an intentionally open-ended, equitable inquiry
— which we consider one of federal common law — to ascertaining individual assets and liabilities; (5) The existence of transfers of assets without formal observance of corporate formalities; (6) The commingling of assets and business functions; [and] (7) The profitability of consolidation at a single physical location." *Id.* at 410; *see also In re Mortgage Inv. Co.*, 111 B.R. 604, 610 (Bankr. W.D. Tex. 1990); *Holywell Corp. v. Bank of N.Y.*, 59 B.R. 340, 347 (S.D. Fla. 1986); *In re Donut Queen, Ltd.*, 41 B.R. 706, 709 (Bankr. E.D.N.Y. 1984) (all applying the *Vecco* seven-factor test).

The First Circuit, in *Pension Benefit Guarantee Corp. v. Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983),

posed five nonexclusive factors a court should consider when contemplating substantive consolidation: whether
(1) the parent owns a majority of the subsidiary's stock; (2) the entitieshave common officers or directors; (3) the subsidiary is grossly undercapitalized; (4) the subsidiary transacts business solely with the parent; and (5) both entities disregard the legal requirements of the subsidiary as a separate corporation. *Id.* at 1093.

In *In re Augie/Restivo Baking Co.*, 860 F.2d 515 (2d Cir. 1988), the Second Circuit surveyed the caselaw and extracted two fundamental principles guiding the substantive consolidation inquiry: (1) "whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit" and (2) "whether the affairs [of the two companies] are so entangled" that consolidation will be beneficial. *Id.* at 518 (internal quotation marks omitted). The Ninth Circuit has also adopted this test. *See In re Bonham*, 229 F.3d 750, 766 (9th Cir. 2000).

The Eighth Circuit considers three factors: (1) "the necessity of consolidation due to the interrelationship among the [entities]"; (2) "whether the benefits of consolidation outweigh the harm to creditors"; and (3) "prejudice resulting from not consolidating the debtors." *In re Giller*, 962 F.2d 796, 799 (8th Cir. 1992).

Finally, the D.C. and Eleventh Circuits have adopted a two-part test. First, the proponent of consolidation

must make a *prima facie* case, demonstrating: (1) that "there is substantial identity between the entities to be consolidated; and (2) [that] consolidation is necessary to avoid some harm or to realize some benefit." *Eastgroup Props. v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991); *see also In re Auto-Train*, 810 F.2d 270, 276 (D.C. Cir. 1987). The *Eastgroup* Court noted that, in making this *prima facie* case, the proponent for consolidation may want to use the *Vecco* factors or the *Ouimet* factors discussed above determine when substantively to consolidate two entities. While in the bankruptcy context the inquiry focuses primarily on financial entanglement,[8] for Title VII the focus more often rests on the degree of operational entanglement — whether operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another. Relevant operational factors include (1) the degree of unity between the entities with respect to ownership, management (both directors and officers), and business functions (*e.g.*, hiring and personnel matters), (2) whether they present themselves as a single company such that third parties dealt with them as one unit, (3) whether a parent company covers the salaries, expenses, or losses of its subsidiary, and (4) whether one entity does business exclusively with the other. That is not to say that the considerations showing financial entanglement[9] are not relevant in Title VII cases; they assuredly are. Indeed, the line between operational and financial may be blurred (*e.g.*,

when the third parties dealing with entities as one unit are creditors). However, we assume that financial entanglement will be present less frequently in Title VII cases than in bankruptcy cases and will be harder for a Title VII plaintiff to prove, given that a typical Title VII plaintiff has more limited resources and an *Eastgroup*, 935 F.2d at 249. Once the proponent for consolidation has made this showing, "the burden shifts to an objecting creditor to show that (1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation." *Id.*; *see In re Auto-Train*, 810 F.2d at 276.

1. 8. *See generally* Mary Elizabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 49 U. Pitt. L. Rev. 381, 385 (1998) ("In cases where the disentanglement of the assets and liabilities of various entities is prohibitively expensive or even impossible, substantive consolidation may significantly increase creditor recoveries.").

2. 9. Among them are (1) the degree of difficulty in segregating and ascertaining individual assets and liabilities, (2) the existence of transfers of assets without formal observance of corporate formalities, (3) the existence of parent and intercorporate loan guarantees, (4) whether the subsidiary is grossly undercapitalized, and (5) the existence of consolidated financial statements. attorney who does not specialize in financial transactions.[10] Proving extensive financial entanglement will, however, bolster a Title VII plaintiff 's case.

3. Application of Our Disjunctive Test

Under the standard just discussed, and viewing the facts in the light most favorable to Nesbit, we nonetheless hold that no reasonable jury would consider Gears and Winters a single employer under Title VII for purposes of the fifteen-employee requirement. First, there is no record evidence that Gears and Winters split themselves into separate entities to evade Title VII. Nor has Nesbit alleged that Gears and Winters hold themselves out as one entity or that they remain separate only to evade anti-discrimination laws. On the contrary, such a claim is implausible, as Vaughn Sr. assumed his ownership interests in Gears and Winters seventeen years apart, and the two companies produce different products.

Second, because Gears and Winters do not have a parent-subsidiary relationship, the second situation for combining employees (a direction from the parent to the subsidiary to discriminate) does not exist. In any event, there is no evidence that one corporation (Winters) ordered the other (Gears) to commit a Title VII discriminatory act.

Finally, Nesbit sets out no evidence — other than Gears'

10. Employees or prospective employees are generally not sophisticated parties and typically do not have the opportunity to conduct extensive due diligence on employers to ascertain whether they will be protected by Title VII should they accept an offer of

employment. This is in contrast to the arms-length commercial transactional process by which parties often become creditors in a bankruptcy case. In that context, the parties typically urging substantive consolidation are sophisticated and have had an opportunity to conduct due diligence on the debtor in question to determine its assets, liabilities, and corporate structure, and to bargain accordingly. Thus, absent exceptional circumstances, voluntary creditors should be able to recover only from the entity with which they have bargained. *See* Christopher W. Frost, *Organizational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups*, 44 Hastings L.J. 449, 453 (1993) ("[U]nlike voluntary creditors, tort claimants are unable to bargain for protection against, or compensation for, the increased risk limited liability imposes.") and Winters' common ownership — suggesting that substantive consolidation would make sense under the factors discussed. The two companies have different management. Nesbit described Randy Lau as "her boss" and conceded he was "more or less in charge" at Gears. While Vaughn Sr. fired Nesbit, we do not consider this a significant indication that Winters and Gears do not operate at arms length. Because Vaughn Sr. is president of Gears and a ten percent shareholder, it is unsurprising that he occasionally participated in Gears' management.[11] He was involved in Nesbit's termination only because Lau was unavailable on vacation when Nesbit was terminated. Added to this, there is no indication that Gears and Winters

ignored corporate formalities.

That Gears and Winters coordinate in recruiting job applicants likewise does not make them a single entity under Title VII. Our outcome might be different if Gears had no say in hiring its own employees, if Gears and Winters held themselves out to job applicants as a single company, if the two companies' human resources functions were entirely integrated, and/or if they did not maintain separate payrolls and finances. However, such a situation is not present here. Moreover, there is no record evidence that third parties dealt with Gears and Winters as one unit, that Gears and Winters covered the salaries of the other's employees, or that Gears and Winters did business exclusively with each other.

In the absence of more significant operational entanglement, common ownership and *de minimis* coordination in hiring are insufficient bases to disregard the separate corporate forms of Gears and Winters. We therefore decline to view Gears and Winters as one entity for Title VII purposes. As Nesbit concedes that Gears alone employs fewer than fifteen employees, it is not an

11. While Vaughn Sr. is a director of both Gears and Winters, this fact does not aid Nesbit here. His directorships are likely incidental to his stock ownership, as is often the case among closely held corporations. And as discussed, the overlapping ownership and management of Gears and Winters are insufficient, without more, to warrant substantive

consolidation.
"employer" under 42 U.S.C. § 2000e(b) and Nesbit's suit cannot succeed.

III. CONCLUSION

We hold that whether an entity employs fifteen or more workers is a merits question rather than a jurisdictional inquiry. Thus, because the District Court relied on materials external to the pleadings, it should have evaluated under the summary judgment standard Nesbit's argument for viewing Gears and Winters collectively. Even under that standard, there is no basis to view Gears and Winters together as a single employer. Because Gears alone employs fewer than fifteen employees, we affirm the District Court's dismissal of Nesbit's complaint, albeit on the merits rather than for lack of subject matter jurisdiction.

APPENDIX EXHIBIT "B"

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYVLANIA

NORMA NESBIT	)	**NO. 1:CV-99-655**
	)	
	)	
Plaintiff	)	
vs.	)	
	)	
GEARS UNLIMITED	)	**(JUDGE KANE)**
	)	
Defendant	)	

MEMORANDUM AND ORDER

Before the Court is Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

For the reasons discussed below, Defendant's motion will be granted.

Background

This action arises out of the termination of Plaintiff's employment with Defendant. Plaintiff originally filed a complaint alleging illegal discrimination based on gender pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Defendant moved to dismiss Plaintiff's complaint on the ground that it did not employ 15 or more individuals during the pertinent period and therefore, is not an "employer" within the meaning of Title VII. Rather than oppose Defendant's motion, Plaintiff filed an Amended Complaint in which she alleged that she was not only employed by Gears Unlimited. Inc. ("Gears"), but also by Winters Transmission, Inc., an "associate corporation" of Gears. Defendant then moved to dismiss the Amended Complaint on the ground that Winters Transmission, Inc. has been out of business since 1986, and therefore, could not assist Plaintiff in meeting the 15 employee jurisdictional threshold for Title VII.

Plaintiff then filed a Motion for Leave to File a Second Amended Complaint. In the proposed Second Amended Complaint, Plaintiff alleges that she was not only employed by Defendant Gears but also by Winters Performance Products, an "associate corporation" of Defendant. However, Plaintiff failed to file a brief in support of her motion for leave to file a second amended complaint, as required by the Local

Rules of this Court. Accordingly, the Court issued an order deeming Plaintiffs Motion for, Leave to File a Second Amended Complaint withdrawn, pursuant to Local Rule 7.5.

Thereafter, the Court held a case management conference, at which the parties addressed the jurisdictional issue. Plaintiff's position is that Gears and Winters Performance Products are interrelated entities such that their employees should be aggregated for purposes of meeting the 15 employee jurisdictional threshold for Title VII. After the conference, the Court issued an Order directing the parties to conduct discovery limited slowly to the 15 employee jurisdictional issue. After the parties completed that discovery, Defendant filed the instant motion to dismiss.

Legal Standard

Under Federal Rule of Civil Procedure 12(b)(1), a party may seek dismissal of an action due to the Court's lack of jurisdiction over the subject matter. In this case, Defendant seeks dismissal pursuant to Rule 12(b)(1) on the ground that it did not employ 15 or more individuals during the relevant period and therefore, is not an "employee' within the meaning of Title VII.

Under Rule 12(b)(1), there are two types of jurisdictional challenges: one, to the complaint on its face; and two, to the existence of subject matter jurisdiction in fact. See Daliessio v. Depuy, Inc., 1998 WL 24330 at *2 (E.D. Pa. Jan. 23., 1998).

Where, as here, the Defendant raises a factual challenge to the existence of subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the evidence of disputed material facts will not preclude the court from evaluating for itself the merits of jurisdictional claims." Id. (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). In addition, a factual attack permits the Court to weigh the evidence to determine whether subject matter jurisdiction exists. See id.

A motion to dismiss pursuant to Rule 12(b)(1) differs from a motion for summary judgment in several respects. First, a summary judgment motion is a judgment on the merits of the case, while a jurisdictional inquiry under Rule 12(b)(1) is unrelated to the merits. See Kulick v. Pocono Downs Racing Association, Inc., 816 F.2d 895, 898 n. 6 (3d Cir. 1987). More over, unlike a summary judgment motion, on a Rule 12(b)(1) motion the plaintiff bears the burden of demonstrating to the Court that subject matter jurisdiction exists. See Kehr Packages v. Fidelcor, Inc. 926 F.2d 1406, 1409 (3d Cir. 1991', cert. denied, 501 U.S. 1222 (1991).

In this novel jurisdictional dispute, there is no question that Plaintiff's employer, Gears, employed fewer than fifteen persons during the relevant time frame and is not subject to the requirements of Title VII. However, because an owner of Gears owns other businesses, which Plaintiff views as associated or related to Gears,

Plaintiff argues that the companies should be viewed as one for jurisdictional purposes under Title VII, thereby satisfying the 15 employee prerequisite for Title VII.[1]

Facts

The facts relevant to the jurisdictional issue, as gleaned from the deposition testimony, affidavits, and documents submitted by the parties in connection with Defendants' motion to dismiss are as follows. Vaughn Winter, Sr. ("Winter Sr.") owns an interest in three corporations. From 1955 until its dissolution in 1985, Winter Sr. operated Winters Transmission, Inc., which rebuilt auto transmissions. Winter Sr. established Winters Performance Products ("Winters Performance") in 1973 when Winter Sr. changed his business to emphasize manufacturing. Winters Performance continues to manufacture automobile "rear ends." Gears, Plaintiff's employer, was acquired by Winter Sr. in 1990 when he purchased and renamed Richland, a manufacturer of transmission parts. Winter Sr. also has an ownership interest in Maverick Industries, Inc. ("Maverick"). Maverick warehouses parts, some of which are produced by Winters Performance.

Over the years Winter Sr.'s ownership and control over the companies has been diluted. During the relevant time period, Winter Sr. owned 10% of Gears, with the remaining ownership held in trust in

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[1] The parties agree that if the Court adopts Plaintiffs legal theory, the 15 employee requirement is met.

equal shares for his children Nina Salathe and Vaughn Winter, Jr. Winter Sr. is the President of Gears and his children are 'the other corporate officers. Winter Sr. is also President of Winters Performance and Maverick, companies that he owns in equal shares with his wife Madeline Winter. Madeline Winter is the Secretary/Treasurer of Winters Performance.

Although the parties dispute their legal significance, the facts related to the operational and financial management of Gears and Winters are not in dispute. The companies maintain separate facilities approximately one mile apart in York, Pennsylvania. Although both Gears and Winters Performance are in the automobile part business, the products which each entity produces are separate and distinct. Each company also has it own customers and its own machines and equipment. Winters Performance is one of the customers for whom Gears provides services. However, Gears invoices Winters Performance at the same rate which it invoices other contractors for which it does work. Each company has its own payroll taxes and checks, its own employment policies and work rules, its own time clock and attendance records, and filed its own tax return. With respect to production, there appears to be some interrelationship between Gears and Winters Performance. For example, if the machines at Winters Performance are busy, and Gears has an available machine, then Winters Performance may send a particular part to Gears to have them make it, and then send it back down to Winters Performance.

This would hold true for production of parts for sale or for integration into other products.

Each company has its own daily management. The daily activities at Gears are overseen by foreman Randy Lau, who has no managerial responsibility at Winters Performance. Plaintiff acknowledges that Lau was "her boss" and that he was "in charge" of daily management at Gears. She further acknowledges that Lau provided her with training regarding how to perform her job; that Lau provided her with work assignments; and that she would go to Lau when she had problems, or wanted vacation or other time off from work. There is some dispute regarding Winter Sr.'s managerial role at Gears. Lau on several occasions has called Winter Sr. to resolve problems that Plaintiff raised with Lau, with regard to matters such as improper noises coming from machinery. Winter Sr. testified that he would go to the Gears facility approximately twice a month, and that these visits usually occurred in connection with a machine breaking down. On the other hand, Plaintiff testified that she "guessed" that Winter Sr. spent about two hours a day at Gears.

With respect to hiring and, firing at Gears, hiring for both Gears and Winters Performance begins with Winters Performance in that the public at large learns that Gears or Winters Performance is hiring by means of a sign outside Winters Performance. As noted above, Gears is a short distance away from Winters Performance. If Gears needs employees, someone from Gears will "call down to the office and

he'll say, hey, we can use [a certain type of employee]". Winter Sr. Dep. at 62. Someone from Winters Performance will then send a potential employee to Gears, after they are interviewed by either Winter Sr., his wife, or his son or daughter.

Winter Sr. interviews potential applicants if they might have machine shop qualifications, but only if the applicant is male. This is because he is "uncomfortable" interviewing females, because he feels they would not be truthful with him as a male, based on "past experience." He explains this by indicating that if a woman interviewed him it would make him nervous, and that he feels women would rather work with other women and men would rather work with other men. Further, he stated that he has had "embarrassing situations" come up when male warehouse employees have had interaction with women employees in the past.

Winter Sr. has some decision-making authority regarding hiring at Gears, although his son and daughter control hiring there. For instance, if the soil or daughter informed him about a potential hire, and if he expressed reservations about that person's qualifications, then the person would not be hired.

With regard to firing at Gears, Winter Sr. similarly retains some ability to fire those individuals hired by his son and daughter. For instance, if in theory he were to become aware that an employee was on drugs or stealing, then Winter Sr. would fire the employee, or have his son fire the employee. This would be true for both Gears and Winters

Performance. If an employee were to break equipment, then Winter Sr. would decide whether or not to fire the employee, after taking into account the expense of the equipment and the degree to which breaking the equipment had been intentional This would apply to both Gears and Winters Performance.

In addition to her first shift work at Gears, Plaintiff was hired, at her own request, to work on the second shift at Winters Performance. She did not travel between the two companies during the course of her shift at Gears. Further, Plaintiff received separate paychecks from Gears and Winters Performance and her hours worked for each employer were kept separately and not combined for purposes of overtime.

Discussion

Plaintiff's Second Amended Complaint purports to assert a cause of action against Gears pursuant to Title VII. The statute provides, in pertinent part, that it is illegal for an "employer" to discharge or otherwise discriminate against an individual based upon her gender or some other legally protected characteristic. See 42 U.S.C. § 2000e-2(a)(1) Under Title VII, an "employer' is defined as:

> a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ...

42 U.S.C. § 2000e(a). The "current" year referred to in the statute is the year in which discrimination occurred. See Shepherdson v. Local Union No. 401, 823 F.Supp. 1245, 1248 n. 3 (E.D. Pa. 1993).

Here, Plaintiff has alleged that she was terminated in 1997. Accordingly, for purposes of determining whether Gears maintained the jurisdictional minimum number of employees under Title VII, the relevant time period for consideration is 1996 and 1997. The parties agree that Gears employed fewer than 15 employees on any given working day in 1996 and 1997. Accordingly, Gears alone cannot constitute an employer under Title VII.

However, Plaintiff argues that the number of employees at Gears and Winters Performance should be combined for purposes of determining whether Gears employs sufficient individuals to constitute an "employer" under Title VII. Essentially, Plaintiff argues that Gears and Winters Performance are actually a "single employer" for Title VII purposes.

Under the "single employer" theory, two nominally independent entities which in reality form an integrated enterprise may be considered to be a single employer, thereby allowing the employees of both entities to count toward the jurisdictional threshold, See Daliessio, 1998 WL 24330 at *3. The factors which have traditionally been used in making this determination include: (a) integration of operations; (b) centralized control of labor relations; (c) common management; and (d) common ownership. See id.

The "single employer" test was originally developed through proceedings related to the National Labor Relations Act and the determination of a proper unit for collective bargaining purposes under that law. See Zarnoski v. Hearst Business Communications, 1996 WL 11301 at *4-5 (E.D. Pa. Jan. 11, 1996). It has since been applied by the various circuit courts as a mechanism of determining when two entities should be considered a "single employer" for purposes of Title VII's 15 employee jurisdictional minimum. See id. at n. 8. Although the Third Circuit has never approved the use of the traditional single employer test in the Title VII context, it has been widely used in the district courts in this Circuit, and Plaintiff urges its application here. See id. at *5; Johnson v. Cook Composites and Polymers, Inc., 2000 WL 249251 at *4 (D.N.J. Mar. 3, 2000) (concluding that four factor "single employer" or "integrated enterprise" test is the most appropriate test to determine whether a parent corporation is an "employer" in the employment discrimination context); McNeal v. Maritank Phila., Inc., 1999 WL 80268 at *7 (E.D. Pa. Jan. 29, 1998) (holding that "integrated enterprise" test should be applied in employment discrimination cases); Martin v. Safeguard Scientifics, Inc., 17 F.Supp.2d 357, 363 (E.D. Pa. 1998) (same); Daliessio, 1998 WL 24330 (same). accordingly, this Court concludes that it is appropriate to apply the "single employer" test here.[2]

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[2] Defendant urges this Court to follow the decision of the Seventh Circuit Court of Appeals in Papa v. Katy Industries, Inc., 166 F.3d 937 (7 Ih Cir.

As noted above, the four factors to be analyzed by the Court in making its determination are: (a) integration of operations; (b) centralized control of labor relations; (c) common management; and (d) common ownership. These factors are not to be applied mechanically, but rather are to be viewed within the "totality of the circumstances" in a specific case. See Zarnoski, 1996 WL 11301 at *5. The Court will examine each factor in turn.

(a) Integration of Operations

Defendant argues that there is little or no integration of operations between Gears and Winters Performance. Specifically, Defendant relies on the following facts: Gears and Winters Performance do not have the same customer base; they have their own machines and equipment and make different products; they have different facilities which are approximately one mile away from each other; and they have separate payrolls, financial records, work rules, and file separate tax returns. Defendant also notes that while Winters Performance is a customer of Gears, Winters Performance pays Gears for the work which Gears performs at the same rate which other customers pay Gears.

1999) and reject the application of the single employer test in the context of a discrimination action. However, given the widespread use of the single employer test within this Circuit, as noted above, the Court will utilize that test in this case.

In arguing that the operations of the two companies are integrated, Plaintiff points primarily to the fact that there appears to be some interrelationship between Gears and Winters Performance operations. For example, if the machines at Winters Performance are busy, and Gears has an available machine, Winters Performance may send a particular part to Gears to have them make it, and then send it back down to Winters Performance.

Even assuming some occasional degree of integration with respect to the manufacture of parts, such activity does not demonstrate "functional integration" of the operations of the two companies. To the contrary, Gears and Winters Performance operate independently, in that they produce different products, have different customer bases, and maintain separate facilities, equipment, payrolls, financial records, and work rules. See Daliessio, 1998 WL 24330 at *4 (where two companies had separate space, separate payroll and tax accounts, and separate employment policies, plaintiff failed to show that their operations were functionally integrated). Accordingly, the "integration of operations" factor is not met here.

(b) Centralized Control of Labor Relations

Defendant argues that Plaintiff cannot show the existence of centralized labor relations between Gears and Winters Performance. Defendant relies on the following

evidence: that Gears has a foreman (Randy Lau), whom Plaintiff considered to be "[her] boss" and to be "in charge" at Gears; that Lau provided Plaintiff with work assignments, that she went to him to request vacation or other time off, and that he provided her with training concerning how to perform her job; that Gears and Winters Performance maintain and administer independent sets of work rules; that Plaintiff was unaware of any other instance besides her own where Winter Sr. had terminated, suspended, or directed any formal disciplinary action with respect to a Gears employee. Further, Defendant notes that although Plaintiff worked for Gears and Winters Performance, she did not travel between the two companies during her shift, she received separate paychecks from Gears and Winters Performance, and her hours were kept separate and not combined for purposes of overtime.

Plaintiff points to the fact that all hiring for Gears and Winters Performance begins with Winters Performance, in that the public learns that Gears or Winters Performance is hiring by means of a sign outside Winters Performance. Winters Performance then refers potential employees to Gears. Plaintiff also points to the fact that Winter Sr. interviews employees for both Gears and Winters Performance. Moreover, Plaintiff notes that Winter Sr. retains some decision-making authority regarding hiring at Gears, even though his son and daughter control hiring there. Plaintiff also notes that Winter Sr. retains some control over the firing of Gears employees, acting to fire

employees when extreme circumstances are presented. Finally, Plaintiff notes that Winter Sr. in fact fired her from her position at Gears.

While hiring for Gears may initially begin with Winters Performance, this fact is not determinative of the issue of whether two entities have "centralized control of labor relations." This factor has most often been discussed with regard to parent-subsidiary relationships, where courts have found that to satisfy this prong, "a parent must control the day to day employment decisions of the subsidiary." Martin, 17 F.Supp.2d at 367 (quoting Frank v. U.S. West, Inc., 3 F.3d 1357, 1363 (10th Cir. 1993)). The fact that Winters Performance initially screened employees for Gears fall far short of this standard. The day to day decisions governing Plaintiff's employment (and that of all employees of Gears) were made exclusively by Gears employees and/or officers. Specifically, Gears' foreman, Randy Lau (who has no role at Winters Performance), provided Plaintiff with work assignments and training and received her requests for vacation or other time off. To the extent that Winter Sr. was involved with oversight of Plaintiff's or other Gears' employees' work activities, that fact does not suggest control over Plaintiff's work environment by Winters Performance, as Winter Sr. is an officer and shareholder of Gears. His involvement in Gears' operations is thus appropriate, and there is no allegation or evidence that his involvement is on behalf of Winters Performance. Accordingly, this factor is not met here.

(c) Common Management

With regard to this factor, Plaintiff relies heavily on evidence of Winter Sr.'s involvement with both Winters Performance and Gears. Specifically, Winter Sr. is an officer and shareholder of both companies. Defendant admits that Winter Sr. has some managerial role at Gears; however, Defendant argues that the mere fact that two entities share a manager is insufficient evidence of an integration enterprise. This Court agrees. As Defendant points out, even if two companies share a manager or have some degree of working relationship, that fact is not sufficient evidence of an integrated enterprise. See Martin, 17 F.Supp.2d at 368; Zarnoski, 1996 WL 11301 at *7. Further, as noted by Defendant, the companies do not share a manager, as Gears has a foreman, Randy Lau, who Plaintiff admits is "in charge" at Gears and has no role at Winters Performance. Although Winter Sr. is an officer of both companies, his limited role at Gears, consisting of occasional consultations regarding equipment and employee issues, does not amount to that of a manager. Therefore, this factor is not met.

(d) Common Ownership

Plaintiff argues that Winter Sr.'s ownership interest in both companies is a reflection of the fact that Gears and Winters Performance are two branches of a family business operation ultimately controlled by patriarch Winter Sr. However, Defendant points out

that there is very little commonality of interest between Gears and Winters Performance, noting that Winter Sr. is the only individual with an ownership interest in both companies, and arguing that his interest in Gears (10%) is quite insubstantial. This interest does not suffice to fulfill the common ownership requirement. Even if it did, Plaintiffs ultimate argument would still fail because it is clear that common ownership is the least important prong in the "integrated enterprise" analysis, and that common ownership alone is not enough to constitute an "integrated enterprise." See Martin, 17 F.Supp.2d at 363.

Accordingly, Plaintiff has failed to meet her burden of demonstrating that Gears and Winters Performance constitute an "integrated enterprise" such that the employees of both companies should be aggregated for purposes of meeting the jurisdictional threshold under Title VII.

Order

Accordingly, for all of the reasons discussed above, **IT IS ORDERED THAT:**

(1) Defendant's motion to dismiss Plaintiffs complaint for lack of jurisdiction (Doc. No. 21) is **GRANTED**.

(2) Plaintiffs complaint is **DISMISSED.**

(3) The Clerk of Court shall close the file.

YVETTE KANE
United States District Judge

SUPREME COURT, U.S.
FILED
FEB 25 2004
OFFICE OF THE CLERK

No. 03-1064

IN THE

Supreme Court of the United States

NORMA NESBIT, PETITIONER

v.

GEARS UNLIMITED, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR DENIAL OF THE WRIT

In this matter, Petitioner Norma Nesbit raises concerns with respect to the jurisdictional analysis which a Court should conduct to determine coverage under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"). Respondent Gears Unlimited, Inc. originally filed a Motion To Dismiss this action pursuant to Federal Rule 12(b)(1) before the United States District Court for the Middle District of Pennsylvania, following discovery related to the issue of whether Respondent employed 15 or more individuals during the relevant period, as is necessary to invoke coverage under Title VII. See 42 U.S.C. §2000e(a) (an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"). The U.S. District Court granted the Motion to Dismiss after a review of the factual record presented by the parties. See Petition, Appendix B.

On appeal, the United States Court of Appeals for the Third Circuit held that the U.S. District Court should have reviewed the Motion as a request for summary judgment under Federal Rule 56 rather than under Rule 12(b)(1). Regardless, the Third Circuit found that under the summary judgment standard and the factual record below, the action was properly dismissed. In reaching this conclusion, the Court adopted a standard for determining the circumstances under which the employees of two separate entities could be combined for the purposes of forming a "single employer" with sufficient employees to satisfy the Title VII threshold.

The questions presented and arguments raised in the Petition are not a model of clarity, and it is not entirely clear whether Petitioner seeks to raise the Rule 12(b)(1) issue, the single employer issue, or both. Out of an abundance of caution, Respondent will address both issues.

I. PETITIONER'S BRIEF MISSTATES THE FACTUAL RECORD

Initially, at pages 3-8 of her Brief, Petitioner includes a factual recitation which is wholly unsupported by the record before the U.S. District Court. It is especially noteworthy that while Petitioner's Brief cites generally to witness depositions, there are no page citations or other specific references to the record in ostensible support of the "factual" contentions Petitioner makes. Respondent does not consider it necessary to correct the numerous factual inaccuracies set forth at pages 3-8 of Petitioner's Brief, and would simply rely upon the factual recitations set forth in the U.S. District Court's Opinion (see Appendix B, pp. 44-48), all of which are abundantly supported by the deposition testimony and documentary evidence produced through discovery.

II. THE THIRD CIRCUIT ANALYZED THIS MATTER UNDER RULE 56, A STANDARD WHICH IS MORE FAVORABLE TO PETITIONER

As noted above, Respondent originally presented a Motion requesting the dismissal of this action pursuant to Federal Rule 12(b)(1), and the U.S. District Court analyzed it under that standard. The Third Circuit determined that the Motion should have been reviewed under the summary judgment standards set forth in Federal Rule 56. The Third Circuit's determination in this regard was actually more favorable from Petitioner's viewpoint. See Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3rd Cir. 1991), cert. denied 501 U.S. 1222 (1991); Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 890-91 (3rd Cir. 1977); Gould Electronics v. United States, 220 F.3d 169, 177-78 (3rd Cir. 2000). As such, there is no logical reason for Petitioner to complain about the Third Circuit's decision to analyze the case within the framework established by Rule 56.

Ultimately, the Third Circuit found that there was no dispute as to a material fact and that Respondent was entitled to judgment as a matter of law under Rule 56. At no point in these proceedings has Petitioner ever contended that she was denied a full and fair opportunity to develop a factual record, and indeed, the findings made by the Third Circuit and the U.S. District Court are undisputed and based largely upon Petitioner's own deposition testimony. As such, even if this Court were to find that the Third Circuit should have reviewed this matter under Rule 12(b)(1)

12(b)(1) rather than Rule 56, it would not alter the ultimate result.

III. BOTH THE U.S. DISTRICT COURT AND THE THIRD CIRCUIT CORRECTLY DETERMINED THAT THE "SINGLE EMPLOYER" DOCTRINE WAS NOT APPLICABLE TO THIS CASE.

As noted above, both the U.S. District Court and the Third Circuit considered the issue of whether Respondent and Winters Performance Products, an entity in which Respondent's President possesses an ownership interest, could be combined as a "single employer", thereby allowing the employees of both entities to count toward the jurisdictional threshold. The U.S. District Court analyzed this argument under NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3rd Cir. 1982), which espouses the consideration of the following factors: (a) integration of operations; (b) centralized control of labor relations; (c) common management; and (d) common ownership. Under this standard, the U.S. District Court found that there was insufficient evidence to hold that Respondent and Winters Performance Products could be considered a single employer.

The Third Circuit, in an issue of first impression, rejected the Browning-Ferris rule and adopted a standard similar to that used by the Seventh Circuit in Papa v. Katy Industries, Inc., 166 F.3d 937 (7th Cir. 1997). In so doing, the Third Circuit found that a single employer relationship would exist: (a) when a company had split itself into two entities for the purpose of evading Title VII coverage; (b) where a parent

company directed the subsidiary to perform the allegedly discriminatory act in question; or (c) where the two entities' affairs were so interconnected that they collectively caused the alleged discriminatory practice. See Appendix A, p. 31. The Court concluded that there was no factual basis to conclude that any of these factors were present with respect to the relationship between Respondent and Winters Performance Products.

As noted above, the U.S. District Court analyzed the single employer issue under the Browning-Ferris standard, which fairly could be characterized as a comparatively employee-friendly approach. Even if this Court were to find that the standard adopted by the Third Circuit was incorrect, the fact would remain that the U.S. District Court had already reviewed Petitioner's argument under the more lenient Browning-Ferris test. As such, the ultimate outcome would not be altered.

IV. THE ISSUES PRESENTED BY THIS PETITION ARE NOT OF CRUCIAL IMPORTANCE

Finally, Petitioner suggests that the Third Circuit's Opinion has "far-reaching implications" and that the issues presented in the Petition are "recurrent and important." Respondent would respectfully suggest that Petitioner is grossly overstating this significance of the Third Circuit's ruling in the hope of meeting the demanding standard set forth in Rule 10 of this Court's Rules. In this regard, Respondent would assert: (a) that it is a rare circumstance in which the single employer doctrine revives an otherwise invalid

Title VII claim; (b) that an analysis of the 15-employee threshold under Title VII will virtually always result in the same outcome regardless of whether the issue is reviewed under Rule 12(b)(1) or Rule 56; (c) that there is no serious disagreement among the Circuit Courts concerning these issues, only subtle differences of emphasis; and (d) as the modes of analysis utilized by the U.S. District Court and the Third Circuit clearly reflect, the action was properly dismissed regardless of the legal standard employed. As such, the Third Circuit's Opinion raises no significant issues of law which warrant this Court's review.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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